MAR 24 1967

JOHN F. DAVIS, CLERK

In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1966

No. 1188

CHARLES A. SHADID, FARRIS SHANBOUR, SEYMOUR LESOWITZ, BEVERLY R. LESOWITZ,
Petitioners,

VERSUS

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

CHARLES HILL JOHNS
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March, 1967

UTTERBACK TYPESETTING CO., 13 SO. WALKER, OKLAHOMA CITY, PH. CE 5-0030

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THE CITY OF OKLAHOMA CITY, a Municipal Corporation,
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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

Petitioners pray that a Writ of Certiorari issue to the Supreme Court of Oklahoma to review the opinion and judgment of the Supreme Court of Oklahoma, of October 4, 1966. Petition for rehearing, timely filed, and denied on December 27, 1966, and application for leave to file second petition for rehearing denied on February 28, 1967.

OPINION BELOW

The opinion and judgment of the District Court of Oklahoma County, Oklahoma, and the opinion and judgment of the Supreme Court of the State of Oklahoma is printed as Appendix A and B hereto, as the same are not officially reported.

JURISDICTION

The opinion and judgment of the Supreme Court of the State of Oklahoma was entered on October 4, 1966. (Appendix B hereto). A petition for rehearing was timely filed on November 2, 1966, and denied December 27, 1966. An application for second petition for rehearing timely filed, was denied February 28, 1967. The jurisdiction of this Court is invoked under Title 28 U.S.C.A. Section 1257 (2) (3) and Rule 19 of the Supreme Court of the United States. The petitioners have exhausted all of their state court remedies. The constitutional and federal questions were presented to the District Court (R. 50-58) and to the Supreme Court of the State of Oklahoma in the petition for rehearing and in the application for leave to file second petition for rehearing (R. 365 and 369), such constitutional and federal questions being timely raised at the first opportunity petitioners had to present them.

QUESTIONS PRESENTED

1. Whether the opinion and judgment of the Supreme Court of the State of Oklahoma violates petitioners' rights guaranteed by the 5th and 14th Amendments to the Constitution of the United States, in that it is a taking of their private property for private or non-public use without due process of law.

2. Whether respondent City can condemn the land involved for the purpose of respondent City, in the future, negotiating and making lease contracts of said lands to various private "Allied Related Aviation Industry" business concerns for private business purposes.

3. Whether the opinion and decision herein is repugnant to and offends Article 2, Section 23, Constitution of Oklahoma in that the admissions in evidence in the record herein show overwhelmingly that respondent City is seeking to take and acquire the property of petitioners for private or non-public purposes.

4. Whether the opinion and decision herein is repugnant to and offends against Article 2, Section 24, Constitution of Oklahoma, and the 5th and 14th Amendments to the Constitution of the United States, in that said opinion decides that the determination of the character of the use of the land sought to be condemned herein was determined by the City Council of Oklahoma City as a public use and is conclusive herein, notwithstanding the overwhelming evidence and admissions in the record herein showing conclusively that Oklahoma City only intends to use said land to make lucrative lease contracts with private "Allied Related Aviation Industry" concerns, for private business purposes.

5. Whether the opinion and decision of the Supreme Court of Oklahoma herein has deprived petitioners of their property and property rights without due process of law in violating Article 1, Section 1, Article 2, Sections 6 and 7, Constitution of Oklahoma, and contrary to, and in violation of the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States, inasmuch as said opinion and judgment resulted from a preliminary advisory opinion of a panel of three (3) private attorneys, there being no authority in the Constitution and laws of the State of Oklahoma authorizing any private attorney, or

panel of private attorneys, to prepare an opinion for the Supreme Court of Oklahoma, advisory or otherwise.

CONSTITUTION INVOLVED

Constitution of the State of Oklahoma:

Article 1, Section 1:

"The State of Oklahoma is an inseparable part of the Federal Union, and the Constitution of the United States is the supreme law of the land."

Article 2, Section 6:

"The courts of justice of the State shall be open to every person, and speedy and certain remedy afforded for every wrong and for every injury to person, property, or reputation; and right and justice shall be administered without sale, denial, delay or prejudice."

Article 2, Section 7:

"No person shall be deprived of * * * property, without due process of law."

Article 2, Section 23:

"No private property shall be taken or damaged for private use, with or without compensation, unless by consent of the owner, except for private ways of necessity, or for drains and ditches across lands of others for agricultural, mining, or sanitary purposes, in such manner as may be prescribed by law."

Article 2, Section 24, in part:

"* * * In all cases of condemnation of private property for public or private use, the determination of the character of the use shall be a judicial question."

Constitution of the United States, 5th Amendment:

"No person shall be deprived of property without due process of law."

Constitution of the United States, 14th Amendment:

"Nor shall any state deprive any person of life, liberty, or property without due process of law."

STATEMENT OF THE CASE

Respondent filed its petition in Eminent Domain against petitioners on March 21, 1963. The petition sought to acquire certain lands "for the purpose of constructing, operating, and maintaining an airport thereon *and uses incidental thereto*" (R. 8). Petitioners filed exceptions to report of commissioners and interposed a plea to and denied jurisdiction of the court in this proceeding (R. 50-58).

The jurisdictional plea of petitioners was and is predicated upon the fact that respondent was, and is, seeking to acquire the property involved by condemnation, without the consent of petitioners, in violation of the Constitution and laws of the State of Oklahoma, and the Constitution of the United States in that respondent had and has no contemplated use of the property involved for airport purposes, but that the land sought to be so acquired by respondent in Eminent Domain was purely for private purposes, and that to permit respondent to take and acquire petitioners' property, without their consent, in Eminent Domain and condemnation for purely private purposes would be unreasonable, arbitrary, capricious and unwarranted and in direct violation of the Constitution of the United States and the Constitution and laws of the State of Oklahoma.

After an extended trial on the jurisdictional plea of petitioners, the District Court rendered its judgment and decree sustaining the plea of petitioners. (Appendix A).

Respondent appealed to the Supreme Court of the State of Oklahoma, and on October 4, 1966, the Supreme Court of the State of Oklahoma entered an opinion and decision reversing the judgment and decree of the District Court. (Appendix B).

Petition for Rehearing was timely filed (R. 365), and denied on December 27, 1966 (R. 368).

Application for Second Petition for Rehearing was timely filed (R. 369), and denied (R. 370).

Notice of appeal was filed and served upon respondent on *March 1, 1967* (R. 372).

REASONS FOR GRANTING THE WRIT

The Eminent Domain question involved herein affects a great number of property owners of the United States as well as petitioners. This basic question is whether any condemning authority has the right to take and acquire private property by condemnation, without the consent of the owner, for the avowed purpose of acquiring title thereto, and thereafter negotiating and making lease contracts thereupon with private business entities for their use in private business.

In this case respondent City seeks to condemn petitioners' property which is in the vicinity of the airport of Oklahoma City, Oklahoma. The record evidence reflects that respondent admits that it seeks to acquire the property

of petitioners in order that respondent can negotiate lease contracts with "Allied Related Aviation Industry" business concerns for private business purposes (R. 246-249).

Petitioners aver that in this case respondent seeks to acquire petitioners' property for private purposes, or for non-public purposes, and that the decision of the Supreme Court of Oklahoma violates and offends against the Constitution and laws of the State of Oklahoma, and deprives petitioners of their property without due process of law contrary to the Fourteenth Amendment to the Constitution of the United States.

Petitioners contend herein that the taking of their property, without their consent, by respondent City for the private use of another is not due process of law and is a violation of the Fourteenth (14th) Amendment to the Constitution of the United States. *Missouri P. R. Co.* v. *Nebraska, ex rel. Board of Transportation,* 164 U.S. 403, 17 S.Ct. 130, 41 L.Ed. 489.

In *City of Cincinnati* v. *Vester,* 33 F.2d 242, the Court of Appeals of the Sixth Circuit held (Headnotes 1, 2, 3):

> "The due process clause of the Fourteenth Amendment to the Constitution applies to the state and all of its agencies.
>
> "Condemnation of property for a nonpublic use is a denial of due process of law.
>
> "Whether use for which property is sought to be condemned is public or private is a judicial question."

The Supreme Court of the United States on Certiorari, affirmed the Court of Appeals decision, *supra,* its decision

and opinion being reported in *City of Cincinnati* v. *Vester*, 280 U.S. 545, 50 S.Ct. 360, 74 L.Ed. 950, holding (Headnotes 1, 4, 6):

> "1. In considering the application of the 14th Amendment to cases of expropriation of private property, the question what is a public use is a judicial one.
>
> * * * * * *
>
> "4. A statement by a city council that an excess condemnation, sought in connection with a taking of property for public use, is in furtherance of such public use, is not conclusive.
>
> * * * * * *
>
> "6. Power conferred upon a municipal corporation to take private property for public use must be strictly followed."

The record evidence and admissions reflect that respondent City does not need, nor does respondent City intend to use any of the property involved for any purpose necessary to the operation and use of its airport. The master plan of the airport (R. 117) reflects that all of the property involved herein is denominated as "Aviation Related and Development Area." The testimony of the airport manager of respondent City (R. 246-249) is an admission that respondent City seeks to acquire the property involved so that respondent can negotiate with private business concerns and make and execute lease contracts to any private business concern which uses air transportation, in any way, in the conduct of its private business, such as an oil company or shirt manufacturing company.

We aver herein that in this case respondent City seeks to take petitioners' property for the private use of private

business concerns, and the opinion and judgment of the Supreme Court of Oklahoma deprives petitioners of their property without due process of law. Every property owner in the United States is vitally interested in the question we here present. Here respondent City seeks to take the property of petitioners away from them so that respondent City can negotiate and execute lucrative lease contracts upon the lands herein with private business concerns, such as oil companies and shirt manufacturing companies, so that such private business concerns can conduct their private business upon said lands. We believe, sincerely, and submit that under the decision and opinion of the Supreme Court of Oklahoma herein, the constitutional guaranty that *private property shall not be taken for private use has been destroyed.* We believe every property owner in the United States has a great interest in this fundamental basic constitutional question, and are affected as a class, and submit a Writ of Certiorari should be granted for this reason.

Petitioners contend there is an additional reason for granting a writ in this case. The opinion of the Supreme Court of Oklahoma shows on its face that a panel of three (3) private attorneys prepared a preliminary advisory opinion for the Supreme Court of Oklahoma. Petitioners had no notice or knowledge of the participation of the private attorneys in the decision and opinion of the Supreme Court of Oklahoma until the said decision was entered.

Article 2, Section 6, Oklahoma Constitution provides that right and justice shall be administered by the courts of justice of Oklahoma without sale, denial, delay or prejudice.

We submit that the Oklahoma Supreme Court has been influenced by the advisory opinion of the panel of three (3) lawyers engaged in the private practice of law.

"Prejudice" is defined in Webster's Collegiate Dictionary, Fifth Edition, as follows:

> "To cause to have prejudice; Bias the Mind of: as, to prejudice the members of a jury."

"Bias" is defined in Webster's Collegiate Dictionary, Fifth Edition, as follows:

> "Biased or Biassed: Biasing or Biassing: To give bias to: to influence: prejudice: preposses."

"Influence" is defined in Webster's Collegiate Dictionary, Fifth Edition, as follows:

> "The act or the power of producing an effect without apparent force or direct authority: an influence by suggestion."

The impetus of our argument in this respect is that the decision and opinion of the Supreme Court of Oklahoma was influenced by a panel of three private lawyers. We do not charge any corruption, nor ulterior motives of anyone. But we do assert that the opinion and decision of the Supreme Court of Oklahoma was the result of influence upon the Supreme Court, in violation of the Constitution of Oklahoma and the same offends and violates the rights of petitioners under the Fifth (5th) and Fourteenth (14th) Amendments to the Constitution of the United States.

We submit that influence can be exercised by mental persuasion, which is tantamount to coercion. *Chambers* v.

Florida, 309 U.S. 227, 84 L.Ed. 716, 60 S.Ct. 472; *Garrity* v. *New Jersey*, — U.S. —, 17 L.Ed.2d 562, 87 S.Ct. —.

The fairness requisite to due process requires an absence of actual bias in the trial of cases. *In re Murchison*, 349 U.S. 133, 99 L.Ed. 942, 75 S.Ct. 623, it is said:

> "A fair trial in a fair tribunal is a basic requirement of due process."

See also 16 Am.Jur.2d, *Constitutional Law*, § 582, p. 988; *Moore* v. *Dempsey*, 261 U.S. 86, 67 L.Ed. 543, 43 S.Ct. 265.

Actually, in this case, the panel of private attorneys who prepared the preliminary advisory opinion herein performed a function the same as if they had been advocates for respondent. The converse would apply if their preliminary advisory opinion had been favorable to petitioners. There is no statute, or constitutional provision, in Oklahoma authorizing private attorneys to prepare opinions for the Supreme Court of Oklahoma, advisory or otherwise. Clearly these private attorneys influenced the decision and opinion herein.

The basic requirements of the Fourteenth Amendment apply to property rights in civil litigation the same as life and liberty in criminal proceedings. Herein every citizen and property owner in Oklahoma is affected by the Oklahoma Supreme Court decision, and every property owner in the United States is greatly interested in the principles of law involved herein.

We respectfully submit that the questions here presented are of great public interest and affect a great num-

ber of people as a class, and pray that this Court, in its sound judicial discretion, grant the Writ of Certiorari to the Supreme Court of the State of Oklahoma.

Respectfully submitted,

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Attorneys for Petitioners

March, 1967

APPENDIX A

IN THE DISTRICT COURT OF OKLAHOMA COUNTY
STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a Municipal Corporation,	)	
Plaintiff,	)	
vs.	)	No. _____
CHARLES A. SHADID, FARRIS SHANBOUR, SEYMORE LESOWITZ, BEVERLY R. LESOWITZ, ET AL.,	)	
Defendants.	)	

DECREE

This matter coming on to be heard this 7th day of October, 1963, and plaintiff, the City of Oklahoma City, a municipal corporation, appearing by its attorneys Roy H. Semtner, municipal counselor, and Charles E. Chilton, assistant municipal counselor, and defendant Charles A. Shadid and Farris Shanbour, appearing by their attorneys, Smith, Johns & Neuffer, by Charles Hill Johns, and defendants Seymore Lesowitz and Beverly R. Lesowitz, appearing by their attorneys, McClelland, Collins, Sheehan, Bailey & Bailey, by William F. Collins, and all of the parties having announced ready for trial, this cause came on for hearing and defendants introduced their testimony and rested, and plaintiff introduced its testimony and rested, and the Court, on October 8, 1963, after hearing all of the testimony, and after the matter being submitted and argued to the Court, took this cause under advisement and announced that a decision herein would be rendered upon the 9th day of October, 1963, at 9:30 a.m.

And now, on this 9th day of October, 1963, this cause came on for decision of the Court, and thereupon plaintiff, the City of Oklahoma City, a municipal corporation, moved for a dismissal of this cause, and defendants objected to

any dismissal by plaintiff, the City of Oklahoma City, inasmuch as this cause had been submitted to the Court for decision and the matter come on only for a decision of the Court. And the Court determined that inasmuch as this cause had been submitted to the Court and the same taken under advisement, and came on upon this date for the decision of the Court, that plaintiff was not legally entitled to dismiss this cause of action, and the motion for dismissal was by the Court denied. Exceptions allowed. And thereupon the Court rendered its decision and decree in this cause, all as set forth as follows:

This is a continuation of the City of Oklahoma City versus Charles A. Shadid, et al., number 159321 and it comes on for decree in the matter as to whether or not the proceedings will be sustained.

The Court has no doubt in its mind about Oklahoma City's right under the law to condemn certain properties; but that must be solely and only for public use. It can't be for a mixed use—private use and public use combined and wherever the City seeks to condemn property for dual purpose of private use by private concerns and incidentally for public use, the whole proceeding is void and it appears to this Court that that is the situation confronting the Court at this time.

Now, we can't take into consideration the great benefit that might accrue to Oklahoma City relative to the establishment of private industries on this portion of the land that they seek to take by condemnation. In the case of In re Twenty-first St., 96 Southwestern at page 201 from the Supreme Court of Missouri, the Court made this very pertinent statement with which I want to preface the decree.

> "And when the city comes to ask the aid of the court to carry the ordinance into effect, is it possible that the court must be a mere tool to do the will of the

council, with no power to inquire into the truth of the matter?"

Now, this Court isn't just an automation of the City Council of the City of Oklahoma City. "What protection has a citizen of his Constitutional rights if the Court cannot look through a sham and see the truth, and how can the Court learn the truth if it must take the recitals in the ordinance as conclusive, and reject all evidence to show their untruth? What a reproach it would be to our system of jurisprudence and how humiliating would be the attitude of our courts if they were so powerless! But our law is not so lame, and our courts are not so impotent."

I want to read a few other passages from Richmond versus Carneal, 106 Southeastern, 403, which I think is very, very much in point. I am not going into the details of the case but I want to call your attention to certain fundamental principles announced in this case. And this case involves the very fundamentals of the right of condemnation.

"A use to be public must be fixed and definite. It that first question.

"A use to be public must be fixed and denite. It must be one in which the public, as such, has an interest, and the terms and manner of its enjoyment must be within the control of the state, independent of the rights of the private owner of the property appropriated to the use. The use of property cannot be said to be public if it can be gainsaid, denied, or withdrawn by the owner. The public interest" (and this is the dominant feature in connection with this lawsuit) "the public interest must dominate the private gain."

All the evidence this Court has heard from the witness stand yesterday and the day before is indicative of the fact that the private gain will dominate the public interest in the acquisition of this particular land.

[APPENDIX]

Going further, the Supreme Court of Virginia said Cooley's Constitutional Limitations is cited with approval, for the statement that "the public use implies a possession, occupation, and enjoyment of the land by the public at large, or by public agencies" and the evidence we have here is that this property is going to be acquired and there is going to be located on it private industries, allied aviation industries—"and the due protection to the rights of private property will preclude the government from seizing it in the hands of the owners, and turning it over to another on vague grounds of public benefit to spring from a more profitable use to which the latter may devote it."

I have no doubt but what the establishment of these private industries on this particular tract of land on the Will Rogers Airport would contribute considerably to the economic gain of the public, but the private rights of the individual cannot be ignored and this Court and all courts of the land stand in condemnation proceedings as between the dominant power of the state and the rights of the humblest citizens of the state.

Further on in the opinion it says, "where a private use is so combined with the public use that the two cannot be separated, the whole act is void." There is no question in my mind here but what this private use and the public use is so combined that they cannot be separated and not being able to separate the private use from the public use, then the ordinance and the resolution by which this is sought to be condemned is absolutely void.

I want to read another passage which I think is very appropriate in connection with this piece of litigation. "There must be no doubt or uncertainty about the existence of the power." I was thinking yesterday before I read this opinion that where there is any doubt about whether the power exists or whether or not the power has been properly exercised, that doubt must be resolved in

favor of the individual as against the state or any subagency of the state. That's the only way in the world that the individual rights of individual citizens can be protected. "If it is not plainly conferred it does not exist. The state may grant the power generally to condemn any property for a public use, or it may place such restrictions upon the power, the manner of its exercise, or the character of the property that may or may not be taken, as it pleases, and when such restrictions are imposed they must be obeyed."

Now, the City had the right to take this property but when they sought to combine it with a private use, then they condemned the whole proceedings from the very outset where the Court has no other alternative but to declare this proceeding void. "If the limitations or restrictions imposed involve public convenience, or retard the progress of public improvements . . ." Now, there is no question about this being a convenient situation for these private industries to be located adjacent to or on the Airport, if this property were condemned, and this may probably result in the retardation of public improvements, but we connot consider that and that does not rise to the higher right or greater consideration than does the individual rights of these property owners. The remedy is an appeal not to the Court but to the legislature. "They cannot be removed by judicial construction." And this Court's hands are tied absolutely and utterly in trying to acquire this property in this proceeding for the use of the City airport . . . "The courts cannot enlarge a power which the legislature has restricted." And this proceeding must be conducted upon the primary fundamental basis that this property is to be acquired for public use, not for private gain.

It is said that, in the construction of statutes conferring the power of eminent domain, every reasonable doubt is to be resolved adversely to the right; that the affirmative must be shown, as silence is negation; and that,

unless both the spirit and letter of the statute clearly confer the power, it cannot be exercised. And that is exactly the situation confronting the Court in this matter.

We have no disposition to curtail or embarrass the exercise of the power of eminent domain in proper cases . . . And that's the attitude of this Court. In a proper case this Court will and has, affirmed condemnation proceedings. Even if we had the power to do so; but the remedy is a drastic one, and its application is restrained by the Constitution to those cases where the taking or damaging of private property is for "public use." What is a "public use" is not a matter of discretion with the courts, but is one of sound judgment, under all the facts and circumstances of the particular case. Different courts sometimes arrive at different conclusions upon the same state of facts; but whenever the . . . We have just one state of facts confronting the Court in this case; that is that it is going to be used for private purposes and not for public use.

But whenever the remedy is applied, it should always be because there is a direct "public use" of the property taken, and not a mere incidental or indirect "public benefit." That is precisely the situation confronting the Court in this case. And we may be condemned for interfering with the machinery of progress but if the City needs this property for airport purposes, it can acquire it in a proper proceeding. When they sought to combine this property with a private use and public use, they therefore condemned these whole proceedings and require us to hold it as void.

The Court finds that there is a total failure on the part of the City to establish the necessity of taking this property, this ninety-one acres particularly involved herein, for public use; to the contrary, the only evidence discloses that this property is being taken for private use in which the public benefit will be merely incidental or indirect. The asserted taking herein for public use cannot be separated from the

private use to which this property is to be put. We therefore are compelled to hold that this attempted proceeding in eminent domain by which this property is sought to be acquired is void. And the same, including the Report of the Commissioners is invalid and set aside and held to be invalid and void.

The proper decree is accordingly entered in favor of the defendants and I trust the counsel for the defense will prepare a proper decree and present it to the Court at the proper time for filing.

IT IS THEREFORE CONSIDERED ORDERED, ADJUDGED AND DECREED by the Court that the exceptions to the report of Commissioners herein and the plea of denial of jurisdiction of the Court herein filed herein by defendants should be and the same is hereby sustained and all of the proceedings instituted in this cause are adjudicated to be void and of no force and effect, and are ordered dismissed by the Court, to all of which plaintiff excepts, and exceptions are allowed by the Court.

IT IS FURTHER CONSIDERED ORDERED, ADJUDGED AND DECREED by the Court that the application of plaintiff for withdrawal of funds heretofore deposited in this cause by plaintiff be allowed, and plaintiff, upon proper application to the Clerk of this Court shall be permitted to withdraw from this cause the funds heretofore deposited herein, exclusive of Court costs in this cause, which are herein assessed against plaintiff.

IT IS FURTHER CONSIDERED ORDERED, ADJUDGED AND DECREED by the Court that all of the costs of this action be adjudicated and assessed against plaintiff, the City of Oklahoma City, a municipal corporation.

And thereupon, plaintiff gave notice in open Court of its intention to appeal to the Supreme Court of the State of Oklahoma, and requested that said notice be spread upon the proper minutes of this Court, and the same is so

ordered by the Court. And praying an appeal, plaintiff requested an extension of time within which to make and serve Case-made upon appeal, and the Court grants an extension of time of thirty days in addition to the fifteen days allowed by law or a total of forty-five days from October 9, 1963 within which to make and serve a Case-made, either party to have ten days thereafter within which to suggest amendments and the same to be settled upon five days' notice by either party.

DONE in open Court, this 9th day of October, 1963.

/s/ John A. Brett acting
Judge of the District Court

O.K. as to form:
ROY H. SEMTNER, Municipal Counselor
By /s/ Charles E. Chilton
Charles E. Chilton
Assistant Municipal Counselor
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APPENDIX B

FILED
Supreme Court
of Oklahoma
OCT - 4 1966
ANDY PAYNE
Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

THE CITY OF OKLAHOMA CITY, a Municipal Corporation, Plaintiff in Error,	)	
vs.	)	No. 40,974
CHARLES A. SHADID, FARRIS SHANBOUR, SEYMORE LESOWITZ, BEVERLY R. LESOWITZ, ET AL., Defendants in Error.	)	

SYLLABUS

1. The introduction in evidence of a resolution by municipal authorities declaring a necessity for condemning land establishes a prima facie case of necessity, whereupon the burden shifts to the condemnee to show that such taking was not for a public purpose.

2. Where the prima facie case created by the introduction into evidence of a resolution by municipal authorities declaring a necessity for condemning land for municipal airport purposes has not been overcome by other evidence in the trial of the case upon the exceptions to the report of commissioners and pleas to jurisdiction of the condemnees, the decree of the trial court sustaining the objections and pleas to jurisdiction, holding the condemnation proceedings to be void and dismissing the same will be vacated and set aside on appeal, and the case reversed for further proceedings.

APPEAL FROM THE DISTRICT COURT OF
OKLAHOMA COUNTY, OKLAHOMA
Hon. John A. Brett, District Judge.

Action by the City of Oklahoma City, Oklahoma, against Charles A. Shadid and others, land owners, to condemn and acquire certain lands for municipal airport purposes. From a judgment holding the condemnation proceedings void and dismissing the same, the City of Oklahoma City appeals.

REVERSED WITH DIRECTIONS

Roy H. Semtner,
Municipal Counselor,
Robert D. Epperson,
Assistant Municipal Counselor,

Charles E. Halley,
Assistant Municipal Counselor,

For Plaintiff in Error,

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Oklahoma City, Oklahoma,

Of Counsel:
Smith, Johns & Neuffer,

For Defendants in Error.

PER CURIAM:

This is an appeal by the City of Oklahoma City, hereinafter referred to as the City, from a judgment of the Distrist Court of Oklahoma County, rendered in a condemnation proceeding, sustaining the exceptions to the report of the Commissioners made in the proceedings, and pleas of denial of jurisdiction filed by the property owners, defendants in error, hereinafter referred to as defendants, and decreeing all proceedings to be void and dismissing the

same. While the exceptions to the report of the commissioners to pleas to and the denials to jurisdiction set forth several distinct grounds, the sole questions tried and determined in the Court below seem to have been whether or not a public necessity exists for the taking of the land, and whether or not the land is being taken for a public use. The trial court held that the land was not being taken for a public use; and that no public necessity for the taking of the land existed. Therefore, the primary question to be determined in this appeal, is whether or not the land involved is being taken for a legally authorized public use.

The land involved is East of Portland Avenue and adjacent to Will Rogers Airport. It is located within an area designated "Aviation Related and Development Area" in the so-called "Master Plan" of the airport. The City contends that the taking of these tracts is necessary for the proper expansion, development, operation and management of Will Rogers Airport. The defendants, on the other hand, contend that no airport necessity exists, and that the land is being taken for private purposes and for the benefit of private industry, rather than for public use.

Before the condemnation proceedings were instituted, a resolution declaring the necessity for acquiring the land was passed and properly approved by the proper city officials. This resolution was introduced in evidence. The reception into evidence of this resolution of necessity established prima facie a case of public necessity and the burden shifted to defendants to show such taking was not for a public use. In Delfeld v. City of Tulsa, 191 Okl. 541, 131 P.2d 754, we said:

> "When, as is the case here, a municipal corporation is vested with the right of emininet domain, and in the exercise of such right begins proceedings to take the land by formally declaring the necessity for which it

takes, and the use for which the proposed taking is to be made, the necessity of taking is determined, inasmuch as the legislature, having granted this power to the municipality, has settled the question of necessity or expediency. This leaves only the question of whether the taking is for a proper public use. Other considerations are open to attack by other means, but are not a proper subject of consideration in the condemnation proceedings. The defendant could not properly raise the issue that the city intended to acquire this land for some other purpose. All he had a right to contest in the condemnation proceeding was whether the use to which the property was to be put was a public use.

"When the city, by resolution, declared the necessity for condemning this land, for a declared purpose it established a prima facie case of necessity, and the burden then shifted to the defendant to show that such taking was not for a public use."

See also Bush v. Oklahoma City, 194 Okl. 504, 154 P.2d 960; and 143 A.L.R. 1032.

In White v. City of Pawhuska, 130 Okl. 156, 265 P. 1059, this Court held:

"The word 'necessity' in connection with condemnation proceedings does not mean an absolute but only a reasonable necessity, such as would combine the greatest benefit to the public with the least inconvenience and expenses to the condemning party and property owners consistent with such benefit."

Ralph M. Ball, an engineer and member of a firm of engineers who were aviation consultants to the City and who had prepared the Master Plan for Will Rogers Airport for the City, in part testified in substance: That the intended use of the area shown on the Master Plan as Avia-

tion Related & Development Area was for airport use and development. That it was intended to use the property for the development of airport facilities or facilities that were allied to the airport. That the presence of airport facilities helps support the airport because you couldn't have the airport without facilities to support it. That all airport operations are lessee operations, and upon being asked his opinion as a consulting engineer for the City, whether or not the property involved in the lawsuit was necessary for the operation of the airport and its expansion, he answered: "It's definitely needed by the City as a protection from sound and encroachment." The witness also stated: "The primary reason they need it is because they will need to protect themselves from suits and harassments from people that claim losses and abuses from sound, and to properly develop the airport."

In our opinion, the record wholly fails to show any fraud, bad faith or abuse of discretion on the part of the City in attempting to take the lands involved.

Defendants urge that exceptions to report of commissioners and plea to jurisdiction of the Court is the proper procedure to present the legal question of the right of plaintiff to maintain the proceeding in eminent domain and argue that plaintiff possessed no right to acquire by eminent domain or condemnation proceedings, the property of defendants, because the evidence showed the City was not seeking the lands for any necessary public use, but for private use and purpose, and cite in support of this contention, Kansas City v. Hyde, 196 Mo. 498, 96 SW 203, 7 L.R.A. (N.S.) 639 and City of Richmond v. Carneal, 106 SE 403, 14 A.L.R. 1341 (Va.).

In the Hyde case, the property owner contended that the condemnation proceeding was a proceeding to take his property not for a public, but for a private use and the

judgment of the lower court was reversed because it had failed to hear certain evidence offered by the property owner upon this issue. In the City of Richmond case, the question involved was the constitutionality of a Virginia Statute authorizing cities in street opening proceedings to acquire land in excess of their need and to replat, sell and dispose of the excess. We do not regard either of these cases as controlling in the case at bar. The constitutionality of any statute is not involved herein, and the record does not sustain the proposition that Oklahoma City is trying to condemn land in these proceedings for a private purpose.

Without becoming involved in a philosophical analysis of the complexities and complications of modern existence, many things are now reasonably necessary for the establishment, maintenance and operation of a modern, up-to-date, municipal airport. The need of land use, for noise control, elimination of safety hazards, for industrial sites for subsidiary suppliers, repair shops and industrial activities closely related and dependent upon the normal activities of a modern municipal airport, may be reasonably said to be all a part of and a factor to be considered in the proper development, construction, management and operation of a modern municipal airport and such need is a public need, and further, the acquisition of land for such use, or the use of the same to satisfy such need, we think, can be reasonably said to be a public use thereof.

We think the testimony of W. J. Karpenko, Federal Aviation Agency, District Airport Engineer, and of William O. Coleman, Airport Superintendent shows that land uses for repairing and manufacturing for aeronautical use, if it involved use of the runways of the airport, including basing of aircraft that would eventually use runways, or repair of aircraft that would be flown in or out of the airport, for any purpose like agricultural, advertising, student training, and executive travel would be for airport purposes and

legitimate airport uses, eligible for federal aid. We, likewise, conclude that in the instant case the taking of the land involved for such land uses would be for a public use. The power to lease land acquired for airport purposes to private concerns for servicing aircraft, accommodating air travelers and furnishing goods, supplies and commodities directly related to airport operations is conferred by the Municipal Airports Act of 1947, and the exercise of such power, in our opinion, would not convert the public purpose or land use into a private purpose or use. See J. W. Duff v. City and County of Denver, 362 P.2d 1049, and cases cited therein.

The right to acquire by eminent domain proceedings, land, buildings and facilities for airports has been clearly given by the Legislature of Oklahoma to municipalities. Title 3, O.S. 1961, Sec. 61, provides:

> "Every municipal corporation within this State shall have the right and power to acquire, own, operate, improve and maintain, within or without the corporate limits of such municipal corporation, real estate, buildings, improvements and facilities for aviation airports and rights of way therefor. For such purposes every municipal corporation shall have the power to exercise the right of emininet domain within or without the corporate limits of such municipal corporation. For any and all of such purposes in order to carry out the same they shall have the power and authority to issue and sell bonds under and by virtue of the Constitution of this State, bearing interest not to exceed six (6%) per cent per annum, maturing within twenty-five (25) years, and issued in the manner and form provided by law."

The Municipal Airports Act, being Title 3 O.S. 1961, Sections 65.1-65.20, authorizes the present condemnation proceeding. Section 65.2, sub-division (a), reads:

"Every municipality is authorized, out of any appropriations or other moneys made available for such purpose, to plan, establish, develop, construct, enlarge, improve, maintain, equip, operate, regulate, protect and police airports and air navigation facilities, either within or without the territorial limits of such municipality and within or without the territorial boundaries of this State, including the construction, installation, equipment, maintenance and operation at such airports of buildings and other facilities for the servicing of aircraft or for the comfort and accommodation of air travelers, and the purchase and sale of supplies, goods and commodities as an incident to the operation of its airport properties. For such purposes the municipality may use any available property that it may now or hereafter own or control and may, by purchase, gift, devise, lease, eminent domain proceedings or otherwise, acquire property, real or personal, or any interest therein including easements in airport hazards or land outside the boundaries of an airport or airport site as are necessary to permit safe and efficient operation of the airport or to permit the removal, elimination, obstruction-marking or obstruction-lighting of airport hazards or to prevent the establishment of airport hazards."

And, Section 65.5, specifically authorizes the cities to enter into lease agreements.

The defendants also contend that the City was not seeking to acquire the lands involved for any necessary public use, but for private use and purpose. As we have heretofore stated, we think the defendants have failed to overcome plaintiff's prima facie case of public necessity and public use, and that the evidence taken as a whole shows that a public necessity did exist, and that the property of defendants was being taken for public purpose and use and not for private use or purpose.

The defendants, also contend as follows:

> ". . . A municipality delegated the right of eminent domain holds such right as a public trust. Should any municipality of the State of Oklahoma attempt to exercise the power of eminent domain under such delegated power from the State of Oklahoma, and such municipality should wrongfully and illegally attempt to condemn private property under representations of necessity for public use, when in truth and in fact such municipality knew and was possessed of positive facts that it was not necessary for such municipality to have and acquire such property for any public use whatsoever, such concealment of facts by such municipality would constitute a gigantic and colossal fraud upon the landowners whose property was sought to be acquired, and a gigantic and colossal fraud upon the courts of our State, inasmuch as such municipality has a fiduciary duty to make a complete and full disclosure of all of the facts in a condemnation proceeding in eminent domain to the landowners and to the courts of our State."

We have already determined that this property was being taken for a public use and the contention of defendants is based upon the erroneous assumption that the property was being taken for a private use. However, condemnation proceedings constitute "adversary proceedings" as that term is usually employed (see People v. Superior Court of Los Angeles County, Calif., 118 P.2d 47) whether the proceedings are or are not contested, and we find no authority sustaining the proposition that a municipality, as condemnor, owes a greater duty to its condemnee, than does any other condemnor to its condemnee.

In Lansden v. Bear, Fall & Coon Creek W. & S. Con. Dist. # 4, Okl., 370 P.2d 540, we held:

"In condemnation cases, while the particular property sought to be condemned must be necessary for the proposed project, the condemnor's decision as to the necessity for taking the property will not be disturbed in absence of fraud, bad faith or abuse of discretion."

In City of Tulsa v. Williamson, Okl., 276 P.2d 209, we stated:

"* * * that while the question whether a use is a public use is ultimately a question for judicial determination, where the legislative judgment has been declared as to whether a given use is a public use, that judgment will not be overturned by the courts, unless it is clearly apparent that the same is without reasonable foundation."

There is an entire absence of fraud, bad faith or abuse of discretion on the part of plaintiff and after plaintiff established a prima facie case of necessity, defendants failed to sustain the burden that such taking was not for a public purpose, and the trial court's order decreeing the proceedings to be void and dismissing the same, was contrary to law and the evidence.

The trial court's order dismissing the proceedings is reversed with directions to vacate the same and proceed in said cause.

Reversed with directions.

The Court acknowledges the services of *John L. Goode*, who with the aid and counsel of *Richard Steed* and *Harris VanWagner*, as Special Masters, prepared a preliminary advisory opinion. These attorneys had been recommended by the Oklahoma Bar Association and appointed by the Court. The Chief Justice then assigned the case to *Justice Pat Irwin*, for review and study, after which and upon consideration by the Court, the foregoing opinion was adopted.